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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 714

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner,

—v.—

J. H. HODGES and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Atlantic Coast Line Railroad Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the case of *J. H. Hodges et al.* v. *Atlantic Coast Line R. Co.*, No. 22341 in that court, on July 13, 1966.

OPINIONS BELOW

The opinion of the District Court is reported at 238 F. Supp. 425, and appears at pp. 150-57 of the printed record before the Court of Appeals, nine copies of which we have filed.[1] The opinion of the Court of Appeals for the Fifth Circuit has been reported at 363 F.2d 354, and appears herein as Appendix A, at pp. 1a-11a. An earlier opinion in

[1] References to this printed record are hereinafter designated as "R."

this matter by the District Court is reported at 199 F. Supp. 794, and is reproduced at R. 37-44; and an earlier opinion of the Court of Appeals, on review of that decision by the District Court, is reported at 310 F.2d 438 and is reproduced herein as Appendix C, at pp. 15a-26a. The decision of the National Railroad Adjustment Board (First Division) in this matter, dated August 6, 1959, appears at R. 10-16 and appears herein as Appendix D, at pp. 27a-32a. A supplementary award of the Adjustment Board, dated January 8, 1964, appears at R. 93-100, and appears herein as Appendix E, at pp. 33a-38a.

JURISDICTION

The judgment of the Court of Appeals was dated and entered July 13, 1966. A timely petition for rehearing was denied on September 1, 1966. (Appendix B, p. 14a) A stay of the issuance of the mandate of the Court of Appeals has been granted by that court, conditioned on the filing of a petition for certiorari by October 25, 1966. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The basis of jurisdiction in the District Court was § 3 *First* (p) of the Railway Labor Act, 45 U.S.C. § 153 *First* (p), and 28 U.S.C. § 1331 and § 1337.

QUESTION PRESENTED

Whether a federal court, when a proceeding for the enforcement of an award of the National Railroad Adjustment Board is brought before it under § 3 *First* (p) of the Railway Labor Act, is totally precluded from examining into whether there is any rational basis for that Board's refusal to consider a legal defense urged before the Board by one of the parties.

STATUTORY PROVISIONS INVOLVED

This case involves various paragraphs of § 3 *First* of the Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. § 153 *First*. The pertinent provisions are set forth as Appendix F, at pp. 39a-43a.

STATEMENT

The state court FELA suit.—In January 1956, J. H. Hodges, a trainman then employed by the present petitioner, Atlantic Coast Line Railroad Company ("Coast Line"), was injured when a freight car wheel rolled over his left foot while he was working. (R. 64) He then sued Coast Line under the FELA in a state court in Georgia, claiming a total and permanent disability "from railroading," and "further . . . from all work." (R. 68) The *ad damnum* of his complaint was in the amount of $75,000. (R. 64)

After a trial in December 1956 at which Hodges submitted medical proofs of total and permanent disability from railroading (R. 58),[2] a substantial verdict was entered in his favor.[3] (R. 51, 108) Judgment was entered on

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[2] Hodges proffered a doctor who testified that "I doubt that he [Hodges] will ever be able to return to the type railroad yard work that he once did." (R. 58). He also supported his contention with his own evidence. (R. 55) The court charged the jury on permanent disability and on the use of the mortality tables introduced by Hodges in this respect. (R. 61-63)

[3] The verdict was in the sum of $22,005. Special damages were claimed only in the amount of $432.80 (R. 68), and obviously petitioner's lost earnings for the eleven months from the accident through the date of the verdict did not account for the remainder of the verdict.

The verdict was apparently a general one, and accordingly there is no way of telling the gross value which the jury put on Hodges' permanent and total disability from railroading. (There were no

the verdict and Coast Line satisfied the judgment by payment in full on April 8, 1957. (R. 51, 108)

Not long afterwards, on September 30, 1957, Hodges alleged that he was fully able to work and requested that he be taken back to work with his old seniority.[4] (R. 5) Coast Line took the point of view that, having sought and obtained a substantial recovery on the basis that he was permanently disabled from work, Hodges had established that he was no longer entitled to employment by the railroad, and that he was estopped from taking the contrary position. (R. 11-12)

The proceedings before the Adjustment Board.—On behalf of Hodges, the union representing his craft submitted his claim for reemployment with his old seniority to the "minor dispute" procedure set up under Section 3 of the Railway Labor Act, and proceedings accordingly ensued before the National Railway Adjustment Board. In August 1959, the Adjustment Board rendered an award that if—after following a procedure for medical examination set forth in its award—it was found that Hodges was able to work on the day he applied to return to work, he

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proofs of total disability from other gainful work, of a more sedentary nature than railroading.) It may well have been substantially more than the verdict itself, inasmuch as the FELA is a comparative negligence statute; under it, where the employer's fault is found to have contributed to the plaintiff's injury, together with his own fault, the trier of facts is required to award in damages that portion of the injury suffered by plaintiff that corresponds to the degree of the railroad's fault in producing the injury. 35 Stat. 66 (1908), 45 U.S.C. § 53; *Rogers* v. *Missouri Pac. R. Co.*, 352 U.S. 500, 505-06 (1957). Indeed, it may well have been that the jury thought that Hodges' damages were the full $75,000 specified in his complaint, but that the railroad was only about 30% at fault in the accident.

[4] The Coast Line took Hodges' name off the seniority roster shortly after its payment of the judgment. (R. 33)

should be reinstated with back pay as of that date. (R. 14-16)

The Adjustment Board declined to examine the merits of Coast Line's claim of estoppel against Hodges by reason of the position he had successfully urged in obtaining his damage award in the state court. The Board's explanation was that, since the proceeding before it was being prosecuted in the name of the union and not in the name of the individual employee, the doctrine of estoppel could not be applied. (R. 13) The Board's complete discussion of this point was as follows:

> "It has been held that the same rules of res judicata and collateral estoppel apply in an administrative proceeding following a Court judgment that would apply in a second Court action between the parties, but only as to the parties to the record in the Court proceeding.
>
> "Let us keep in mind that when an employee brings a cause of action against a carrier he does so under the Federal Employer's Liability Act and the parties to that cause of action are the employee and the carrier. When a claim is presented to this board it is under the Railway Labor Act and the parties to the claim are the petitioner (the union) and the carrier. Therefore, the parties in the case before us are not the same as the parties in the Court case." (R. 13; App. D, p. 30a, *infra*)

This suit; the early proceedings.—The Coast Line declined to abide by the award of the Adjustment Board, and Hodges and the Brotherhood sued in the District Court for the Northern District of Georgia to enforce the award, as provided by Section 3 *First* (p) of the Railway Labor Act. (R. 1-9) Coast Line moved to dismiss on the

grounds that since the award was in a conditional and alternative form, it could not be enforced in court. (R. 19-20) The District Court granted that motion to dismiss. *Hodges* v. *Atlantic Coast Line R. Co.*, 199 F. Supp. 794 (N.D. Ga. 1961); R. 37-44. On appeal, commenting that there was before it "nothing but the complaint and the annexed award," and emphasizing that its decision did not and was not meant to affect any other issue in the case, the Court of Appeals for the Fifth Circuit reversed. 310 F.2d 438; App. C, pp. 15a-26a, *infra*. The Court of Appeals held that "there was an award of sufficient definiteness to invoke the aid of the District Court in its enforcement." 310 F.2d, at 443; App. C, p. 22a, *infra*. The Court of Appeals ordered the District Court to hold the case on its docket while the parties proceeded to have Hodges examined by physicians in the general form contemplated by the original award of the Adjustment Board, and while the Adjustment Board thereafter filed a further award. 310 F.2d, at 443-45; App. C, pp. 25a-26a, *infra*. After this medical examination, the Adjustment Board, without further discussion of the claim of estoppel, found that Hodges was physically able to resume work, and, on January 8, 1964, issued a supplementary award ordering his reinstatement and awarding him back pay. R. 93-99; App. E, pp. 33a-38a, *infra*.[5]

The present proceedings.—The Coast Line abided in its position that Hodges' recovery of damages for permanent disability from railroading in the FELA suit precluded his contention that he was entitled to be rehired with his full seniority, and it accordingly declined to abide by the award. (R. 36, 101-02) Hodges and the Brotherhood then amended

[5] Since the proofs were not adequate as to Hodges' condition when he sought reinstatement in 1957, and since in its view there was no proof as to his ability to work prior to January 29, 1963, the award provided for back pay only as from that date.

their complaint in the District Court to bring in the supplementary award of the Adjustment Board. (R. 88-89) Coast Line then moved for summary judgment on the basis of its contention of estoppel. (R. 111-12) Following *Jones* v. *Central of Georgia R. Co.*, 331 F.2d 649 (1964), a Fifth Circuit case directly in point, the District Court granted the motion on the grounds that Hodges was estopped from contending that he was wrongfully separated from service after he had successfully alleged and proved that he was permanently and totally disabled from railroad employment. 238 F. Supp. 425 (N.D. Ga. 1964); R. 150-57.

On appeal, the Court of Appeals observed that:

> "[W]e feel compelled to say that we strongly disapprove of any practice which permits an employee to sue his employer claiming permanent and total disability, establish his claim by proof which convinces the jury of the truth and justice of his allegations, obtain and collect a judgment, and then force his employer to reinstate him in his former position with back pay for time lost." (363 F.2d, at 539; App. A, pp. 9a-10a, *infra*)

The Court of Appeals then indicated its disagreement with the only basis given by the Adjustment Board for its failure to apply the doctrine of estoppel, namely, the fact that the parties in the proceeding before the Adjustment Board were different from those in the state court suit: "In this case the NRAB asserts that estoppel does not apply because Hodges was not a party to the proceedings before it; the claim was prosecuted solely by the union on behalf of Hodges. However, it cannot be denied that Hodges was the real party in interest who was to profit by a favorable decision even though not a party in name. As indicated in *Gunther* [*Gunther* v. *San Diego & A.E.R. Co.*,

382 U.S. 257 (1965)], the NRAB is not bound by common law rules."[6] (363 F.2d, at 539; App. A, p. 10a, *infra*)

The Court of Appeals then proceeded to reject certain other subsidiary arguments made in behalf of the Adjustment Board's failure to consider the estoppel doctrine,[7] concluding:

> "It does seem to us that at some point in the procedure the matter of estoppel should have been considered and a decision rendered with respect to it. The NRAB did not consider it. . . ." (363 F.2d, at 539; App. A, p. 11a, *infra*)

Despite all this, the Court of Appeals proceeded to say, in its very next words:

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[6] The Court of Appeals might have added that the statute itself contemplates that the "employee" is to be in every sense a party to the grievance before the Adjustment Board. Section 3 *First* (h), (i), (j), (m), (p).

[7] The award suggested—without specifying any reason—that the proper procedure of the railroad would have been to have brought charges against Hodges seeking his discharge. (R. 14; App. D, pp. 30a-31a, *infra*) Obviously, this alternative would be meaningful only if there were some substance to the Board's view that estoppel could not be asserted in the wrongful discharge grievance because of the formal nonidentity of the parties. Coast Line pointed out, and the Court of Appeals apparently agreed, that there was no reason to bring any charges against Hodges because he knew of the facts concerning the lawsuit he had brought. The Court of Appeals appeared somewhat mystified over this argument on behalf of the award, presumably because a grievance proceeding arising out of a bringing of charges against Hodges would, similarly to the present grievance, have been prosecuted by the union, thus creating the same so-called nonidentity of parties over which the Adjustment Board bobbled.

The award also suggested that the railroad might have conditioned its payment of the FELA judgment upon a release of any rights which Hodges might have had to return to work. (R. 14; App. D, p. 31a, *infra*) But, as the Court of Appeals pointed out, the state court judgment was an absolute judgment for the payment of money and the Coast Line had no standing to require Hodges to sign any releases in order to be paid. (363 F.2d, at 539; App. A, p. 11a, *infra*)

"... and in our view, we are precluded from doing so by *Gunther*."[8] (363 F.2d, at 539; App. A, p. 11a, *infra*)

The Court of Appeals made it plain that under its own prior decision respecting the application of estoppel in this situation, *Jones* v. *Central of Georgia R. Co., supra,* as well as under certain other decisions from other Courts of Appeals,[9] there was a "cogent argument for affirmance" of the District Court's ruling. (363 F.2d, at 538; App. A, p. 9a, *infra*) —But it held squarely that the *Gunther* decision of this Court prevented this, and that it required it to order the District Court to uphold the award of the Adjustment Board regardless of the lack of rational basis for the Adjustment Board's failure to consider the estoppel argument. It accordingly reversed the judgment of the District Court, leaving open to the District Court only the question of the computation of the amount of back pay to be awarded to Hodges despite his proof of and collection of a judgment for a permanent and total disability from railroading.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals, through an extravagant reading of this Court's decision in *Gunther* v. *San Diego & A.E.R. Co.*, 382 U.S. 257 (1965), has apparently abdicated any form of judicial review whatsoever over decisions of the National Railroad Adjustment Board (except with respect to the mathematics of the computation of money

[8] The decision in *Gunther* supervened after the appeal to the Fifth Circuit was initially briefed. The parties submitted short supplemental briefs on the effect of *Gunther*.

[9] The leading one is *Scarano* v. *Central R. Co. of New Jersey*, 203 F.2d 510 (3d Cir. 1953).

awards). To be sure, the Court of Appeals for the Fifth Circuit, prior to the *Gunther* decision, permitted *de novo* review of the Adjustment Board's award in cases where (as in *Gunther*) the award was both for reinstatement and for back pay. See *Brotherhood of Railroad Trainmen* v. *Louisville & N.R. Co.*, 334 F.2d 79, 81 (5th Cir. 1964), *cert. denied*, 379 U.S. 934 (1964). While such an approach could not survive the *Gunther* decision, the present ruling by the Court of Appeals appears to have taken an equally erroneous polar position—that decisions of the Adjustment Board are completely immune from judicial review, and that the only duty of a federal district court when a proceeding to enforce such an award is before it is automatically to enforce it, subject to a recomputation simply of the monetary damages provided in the award.

This decision is so contrary to the normal course of judicial proceedings as to warrant the intervention of this Court's reviewing powers. The federal courts are certainly no more rubber stamps for administrative tribunals than they are for Congress. *Cf. Flaxer* v. *United States;* 358 U.S. 147, 151 (1958). Despite statutory language that may state that an award or other order of an administrative body is "final and binding," the normal rule is that there will be some degree of judicial review of the adjudication of an administrative agency. See *American School of Magnetic Healing* v. *McAnnulty,* 187 U.S. 94 (1902); *United States* v. *Williams,* 278 U.S. 255 (1929); *Bridges* v. *Wixon,* 326 U.S. 135 (1945); *Estep* v. *United States,* 327 U.S. 114 (1946); *United States* v. *ICC,* 337 U.S. 426, 433-34 (1949); *Hiatt* v. *Compagna,* 178 F.2d 42 (5th Cir. 1949), *aff'd by an equally divided Court,* 340 U.S. 880 (1950); *Harmon* v. *Brucker,* 355 U.S. 579 (1958); *Leedom* v. *Kyne,* 358 U.S. 184 (1958); *Blanchard Machine Co.* v.

RFC, 177 F.2d 727 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 912 (1949). This is particularly the case when enforcement of an agency's orders is sought in a federal court under a statutory provision expressly providing for enforcement through judicial proceedings. See *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944); 3 Davis, *Administrative Law Treatise* (1958), pp. 319-23. The Court of Appeals here apparently overlooked this principle and held that since the District Court could not *de novo* try the facts in the dispute, it could not refuse to give effect to the Adjustment Board's award no matter how arbitrary and baseless in reason it was, even as to a matter of law.

This was plain error of a sort which this Court should not allow to stand as a precedent. In the *Gunther* case itself, before ordering the Adjustment Board's order enforced, this Court took pains to observe that it could not "be said that the Board's interpretation was wholly baseless and completely without reason." 382 U.S., at 261. All the Court held in *Gunther* was that the practice of the lower federal courts there,[10] of providing a trial *de novo* of the Adjustment Board's findings—"open[ing] up the Board's finding on the merits"—was erroneous. 382 U.S., at 263. In other words, although there can be no trial *de novo*, and although it even may be that review of the Adjustment Board's awards should be carried out under even a more restricted standard than that prevailing as to the orders of other administrative agencies, the normal principle of some judicial review to insure that there is a basis in fact for the Board's award remains. The Court of Appeals' opinion obviously does not recognize any such room left for the judicial function. The Adjustment

[10] Similar to the prior procedure of the Fifth Circuit. See pp. 9-10, *supra*.

Board's action in refusing to consider the estoppel defense is clearly totally baseless in reason; the Court of Appeals clearly recognized it as such; the Court of Appeals apparently recognized that this sort of estoppel has been recognized as a complete defense as a matter of law;[11] and yet the Court of Appeals expressed itself as without power to deal with the matter and do otherwise than order the entry of a judgment enforcing the award.

The National Railroad Adjustment Board is a public administrative agency, not a private consensual arbitration tribunal; Congress "intended the Board to be and to act as a public agency, not as a private go-between." *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 695 (1963).[12] —But in any event, even if the analogy to arbitration which is often drawn[13] as to the nature of the function of the Adjustment Board under Section 3 of the Railway Labor Act is to be taken

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[11] The defense is uniformly held available on summary judgment and without regard to the actual physical condition of the ex-employee who has collected his verdict. See *Scarano* v. *Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953); *Chavira* v. *Southern Pac. Co.*, 187 F. Supp. 251 (N.D. Cal. 1960); *Ellera* v. *Southern Pac. Co.*, 191 F. Supp. 716, 722 (N.D. Ill. 1961); *Alcorn* v. *Missouri-Kansas-Texas R. Co.*, 88 F. Supp. 471, 472 (W.D. Mo. 1950); *Buberl* v. *Southern Pacific Co.*, 94 F. Supp. 11, 12 (N.D. Cal. 1950); *New York Cent. R. Co.* v. *Rials*, E.D. Ill. Civil No. 5021, July 7, 1964 (R. 132-39).

[12] Indeed, in the *Machinists* case, this Court so stated as to an airline system board of adjustment, created by private agreement under § 204 of the Railway Labor Act, which provides that these system boards shall have functions analogous to those exercised in the rail industry by the NRAB under § 3 *First*. Obviously, the case of the permanent statutory NRAB expressly constituted by § 3 *First* is an *a fortiori* one.

[13] See *Gunther* v. *San Diego & A.E.R.Co.*, *supra*, 382 U.S., at 263-64; *Brotherhood of Locomotive Engineers* v. *Louisville & N.R.Co.*, 373 U.S. 33, 40 (1963).

as indicating that a more minimal standard of review should be applied by the courts than is ordinarily the case with administrative findings, the fact remains that even judged by the standards of an arbitration award, an action such as the Adjustment Board's arbitrary refusal to apply, and disregard of, the doctrine of collateral estoppel, would be reversible by a court reviewing the award. See *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960);[14] *San Martine Cia.* v. *Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961) ("manifest disregard of the law"); *Evans* v. *Hudson Coal Co.*, 165 F.2d 970 (3d Cir. 1948). Moreover, whether one labels the Adjustment Board as "agency" or "arbitrator," it might well be appropriate to pay greater deference to certain aspects of the Adjustment Board's award—like those involving the interpretation of the collective bargaining agreement, with which this Court dealt in *Gunther*—than to other points, such as the issue of law which is presented here. *Cf. United Steelworkers* v. *Enterprise Wheel & Car Corp., supra.* Indeed, this issue, with its overtones of preserving the integrity of the administration of justice in the courts through the prevention of a party's collecting twice on inconsistent claims[15] is particularly appropriate for at least some measure of judicial review. Certainly on the question whether the Coast Line's estoppel defense

[14] ". . . . [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." 363 U.S., at 597. —The Board's basis here for rejecting the estoppel defense had nothing to do with the agreement, but rather related only to its notion as to the requirements of the identity of parties.

[15] Since reinstatement awards characteristically also include back pay at the full rate, and since in these cases by definition the employee has collected a capital-sum award for the permanent total or partial loss of his earning power, it is evident that the effect of not applying the estoppel doctrine is to make the railroad com-

could be considered, the Board has no particular expertise; and a function for the reviewing court as the guardian of fair procedure here would appear to be warranted.—In any event, the point remains that regardless of what the precise standard of judicial review may be, if there is any degree of judicial review at all, the action of the Adjustment Board here was obviously subject to being set aside.[16] The decision of the Court of Appeals to the effect that it could not be set aside should be reviewed; on that review we would propose to brief to this Court our views as to the proper standard.

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pensate the employee twice for his loss of earnings. The Third Circuit once aptly characterized the reason why estoppel is applied in these circumstances as the prevention of "that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate." *Scarano* v. *Central R. Co. of New Jersey, supra,* 203 F.2d, at 513. Obviously, while styled "estoppel" the doctrine also contains aspects of the defenses of *res judicata* and of payment.

The early decisions of this Court on the principle of estoppel are revealing. In *Davis* v. *Wakelee,* 156 U.S. 680, 689 (1895), this Court declared: "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." See also *Ohio & M.R. Co.* v. *McCarthy,* 96 U.S. 258, 268 (1878).

[16] Indeed, serious claims of constitutional rank would be raised if it were held that the courts had no power to do otherwise than enforce an award of a public agency, like the NRAB, which was completely arbitrary and without basis in reason, at least in a case where a party was compelled to resort to it. See *Washington Terminal Co.* v. *Boswell,* 124 F.2d 235, 244-45 (D.C. Cir. 1941), *aff'd by an equally divided Court,* 319 U.S. 732 (1943); *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). This would appear to be particularly the case where the administrative agency, as here, through an arbitrary means deprived a party of the procedural right to have a meritorious defense considered on the merits. See *Hannah* v. *Larche,* 363 U.S. 420, 442 (1960). Cases where the party had an alternative remedy in court, and chose not to pursue it, stand on a different footing. Cf. *Union Pacific R. Co.* v. *Price,* 360 U.S. 601, 607 n. 6 (1959).

2. The ruling of the Court of Appeals is obviously an important interpretation of this Court's decision in *Gunther* that will have widespread effects whether or not other circuits follow it,[17] particularly in view of the liberal venue provisions for the enforcement of Adjustment Board awards.[18] The National Railroad Adjustment Board disposes of close to 2000 cases each year.[19] The ruling below, to the apparent effect that even though the Adjustment Board's decisions in these cases turn on legal points for which there is no rational support, they must be enforced by the courts, will stand in the Fifth Circuit, and may be followed in other circuits, as a guiding principle in enforcement proceedings under Section 3 *First* (p) of the Railway Labor Act in the District Courts. The far-reaching scope of the ruling hardly needs elaboration.

Indeed, even if somehow restricted to the availability of the estoppel defense itself,[20] it appears that the question here is a recurring one. The "miraculous recovery" story of respondent here occurs with such discouraging frequency as to invite cynicism. There are a considerable number of reported cases, both court and Board decisions, relating to the employee's claim of sudden recovery which involve the

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[17] Indeed, one other Court of Appeals has already indicated in dictum that it also believes that *Gunther* means that awards of the Adjustment Board are "not within the ambit of judicial review." *Leeds & Northrup Co.* v. *NLRB*, 357 F.2d 527, 532 (3d Cir. 1966).

[18] Under § 3 *First* (p), such suits may be brought not only in the district of residence of the employee, but in any district "through which the carrier operates." The provisions for venue in suits under the new § 3 *First* (q) of the Act, as recently added, to set aside orders of the Adjustment Board denying grievances, are similarly broad. See pp. 16-18, *infra;* App. F, p. 42a, *infra.*

[19] National Mediation Board, Annual Report (Including Report of National Railroad Adjustment Board) (1965), p. 76.

[20] Or even if the issue were restricted to wrongful discharge cases; there are about 200 of these per year, based upon our survey of Awards of various Divisions in the period 1963-66.

issue of estoppel through the prior successful maintenance of a personal injury claim for permanent and total disability.[21] Even if it were possible—which it is not—to confine the effect of the decision below to this category of cases, it would thus be of more than passing importance. But, as we have indicated, the decision below is clearly based on a general assumption that there is no room left for even a minimal review of Adjustment Board decisions to determine whether they have a rational basis.

3. The recent amendment by Congress (Pub. L. 89-456, 80 Stat. 208, June 20, 1966) of certain of the provisions of Section 3 *First* of the Railway Labor Act adds importance to the question presented.[22] In Section 2(e) of Public Law 89-456, Congress added a new Section 3 *First* (q) to the Railway Labor Act which has as its purpose the providing of a statutory review procedure for an Adjustment Board order which denies an employee grievance, thus changing the rule of *Union Pacific R. Co.* v. *Price,* 360 U.S. 601 (1959), to the effect that such awards were not subject to judicial review. See S. Rep. No. 1201, 89th Cong., 2d Sess. (1966), p. 3; H.R. Rep. No. 1114, 89th Cong., 1st Sess. (1965), pp. 14-15. Thus the Court of Appeals' approach will from now on affect not only attempts by carriers to challenge Board awards in favor of employees by resisting enforcement proceedings under Section 3 *First* (p) of the Act, but it will affect employee actions seeking review of

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[21] Besides the court cases which are referred to at pp. 7, 9 n. 9, and 12 n. 11, *supra,* the estoppel doctrine has been recognized in Adjustment Board awards. See, *e.g., A. J. Dalbo and Southern Pacific Co.,* 1st Div. NRAB, Award No. 16819, November 18, 1954; *Richard Gammon and Central of Georgia R. Co.,* 1st Div. NRAB, Award No. 6479, February 17, 1942; *B. H. Simms and Atlantic Coast Line R. Co.,* 2d Div. NRAB, Award No. 1297, February 24, 1949.

[22] In Appendix F we set forth the statutory provisions in composite form to show the amendment's effect.

adverse decisions of the Board under the new Section 3 *First* (q).[23]

Moreover, the legislative history of the new amendment not only indicates that the question implicit in the Court of Appeals' action here will remain as a problem under the amended Act, but that the Court of Appeals' conclusion of total nonreviewability of Board awards even where they are without basis in reason is incorrect. To be sure, Public Law 89-456 both added to Section 3 *First* (p), and included in the new Section 3 *First* (q), an express provision to the effect that the award of the Board may be set aside "for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the

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[23] Certainly nothing in the amendments to the Act negates the significance for the future of the ruling of the Court of Appeals. The decision of this Court in the *Gunther* case, to which the Fifth Circuit overreacted, was essentially an interpretation of the provisions of § 3 *First* (m) to the effect that Adjustment Board awards "shall be final and binding upon both parties to the dispute except in so far as they shall contain a money award." See 382 U.S., at 263. The point of the decision in *Gunther* was that the exception for money awards did not relate to any award which happens to contain a provision for money damages, but simply to the monetary aspects of those awards. The only change which Public Law 89-456 made in § 3 *First* (m) was to strike out the words "except in so far as they shall contain a money award." Obviously this does not affect the problem in a case like the one at bar, where the controversial provisions of the award relate to a matter which under *Gunther* was not within the repealed exception to § 3 *First* (m) in any event.

Public Law 89-456 also rectified the apparent contradiction between the provision of § 3 *First* (m) to the effect that awards should be "final and binding upon both parties" and the former provision of § 3 *First* (p) to the effect that the order of the Adjustment Board "shall be prima facie evidence of the facts therein stated", by amending the latter language to make it read "shall be conclusive upon the parties." See App. F, p. 42a, *infra*. But this Court in *Gunther* had made it clear that the provision of § 3 *First* (m) was the controlling one in any event.

division making the order." But the Senate Labor and Public Welfare Committee Report makes it plain that even in the absence of any express language the Committee was also of the view that, under the then-existing law and the law as to be amended by the proposal, the federal courts would not have to enforce an award which was without rational basis. For the Committee stated that it had acted[24] "on the assumption that a federal court would have the power to decline to enforce an award which was actually and indisputably without foundation in reason or in fact, and the Committee intends that, under this bill, the courts will have that power." S. Rep. No. 1201, 89th Cong., 2d Sess. (1966), p. 3.

Thus, not only does the Court of Appeals' holding that the courts are without power to decline enforcement of the award—even where the Board, without any rational basis, declined to consider a matter which would have afforded a defense to one of the parties—threaten to stand as a limitation on the rights to judicial review of both carriers and employees under the amended Act; it also contradicts the express views of the cognizant Committee of Congress[25] as

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[24] The context of the Committee's remark was the following: The Committee had considered a proposal that the bill be amended to include as an express ground "for setting aside an award 'arbitrariness or capriciousness' on the part of the Board." The Committee stated that it decided not to accept this amendment because it might be construed as providing for what would be in practice *de novo* review: "The Committee declined to adopt such an amendment out of concern that such a provision might be regarded as an invitation to the courts to treat any award with which the court disagreed as being arbitrary or capricious." S. Rep. No. 1201, 89th Cong., 2d Sess. (1966), p. 3. The Committee then stated that "this was done on the assumption" quoted in the text above. *Ibid.*

[25] While the House Committee Report stresses the limitations on judicial review, it was written before *Gunther* and essentially relates to the bill's function—largely made moot by *Gunther*, see p. 17 n. 23, *supra*—of negating the *de novo* review doctrine. H.R. Rep. No. 1114, 89th Cong., 1st Sess. (1965), pp. 3, 15, 17.

to the scope of judicial review in the court proceedings contemplated by Section 3 *First* of the Act. Clearly this conflict underscores the extraordinary character of the holding of the court below, and indicates the necessity of review by this Court.

CONCLUSION

For the reasons stated, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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